

FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: Case No. 08-31796-bjh11

Dorado Beckville
Partners I, L.P. Chapter 11

Date: 4/15/2009

(DEBTOR) TIME: 1:22 P.M.

VOLUME 1 OF VOLUME 1
HEARING BEFORE THE HONORABLE BARBARA J. HOUSER,
UNITED STATES BANKRUPTCY JUDGE

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EXHIBIT

"A"

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1 THE COURT: All right. That brings us to
2 Dorado Beckville Partners, L.P.

3 MR. ROBERSON: Good afternoon, Your Honor,
4 Rich Roberson, Marcus Helt, Andrew Spaniel with
5 Gardere on behalf of Dorado Exploration, Ben
6 Mesches's who is appellate counsel to Dorado is
7 also here.

8 THE COURT: Very well.

9 MR. SPECTOR: Brian Hail, Steve Wacoviak
10 and Howard Marc Spector on behalf of the Impact
11 Entities. Your Honor, Mr. Hail and Mr. Walkowiak
12 are really going to take charge of this hearing,
13 and I'm quite sick, so I'm going to be the one
14 just coughing soundly in the back.

15 THE COURT: I'm sorry that you're sick.
16 All right. We ready to proceed?

17 MR. ROBERSON: Your Honor, I believe we
18 are ready to proceed. At the lunch hour we
19 received an objection to certain evidence that we
20 had filed about three weeks -- almost three weeks
21 ago now. It appeared what I saw at lunch to be an
22 objection to our witness and exhibit list which
23 obviously you don't have witness and exhibit lists
24 in motions for Summary Judgment, but the system at
25 the office was working, it cranked out a witness

1 and exhibit list. When I got back to the office
2 at lunch I found there was an objection to the
3 Affidavit of Mr. Schmidt that we filed along with
4 our Response to the Motion for Summary Judgment.
5 I think we ought to take that up first before we
6 proceed.

7 THE COURT: All right. I'll be honest.
8 I've not seen it. I was unaware of any objection
9 either. When was it filed?

10 MR. ROBERSON: It was filed sometime
11 around noon today. While I've got the podium, if
12 the Court will permit me, obviously we object to
13 it as late filed. The Court gave us a scheduling
14 order several weeks ago, a very tight turn-around
15 time. We have had recently a Motion to Strike
16 that was filed on almost 22 days notice moved off
17 because of scheduling issues. I think that this
18 objection is late, should have been filed sometime
19 ago, and when filed, it should have been filed
20 properly and denominated an objection to the
21 Summary Judgment evidence, not an objection to the
22 witness and exhibit list.

23 MR. HAIL: First of all, with regard to
24 the -- I'm not sure -- we received today an
25 Amended Witness and Exhibit List for this hearing,

1 this Summary Judgment hearing today. That was
2 somewhat confusing to us. We called over there
3 and I think -- personally, I've got somewhat of a
4 belt and suspender situation, but still, it's
5 obviously concerning. We're not going to try to
6 live testimony or exhibits at this hearing so --

7 THE COURT: Well, let's focus on the
8 issue as to you as to opposed to --

9 MR. HAIL: Yeah, I know, and that goes to
10 that issue.

11 With regard to the -- in the reply to
12 the Response, not the initial Motion for -- his
13 Motion for Summary Response, reply back to that or
14 Response and reply back to that, it was in the
15 latest filing of Dorado that they attached
16 Mr. Schmidt's Affidavit.

17 We made some limited objections to his
18 Affidavit. I don't think there was any scheduling
19 that the Court spoke to with regard particularly
20 to any Affidavit that had been filed.

21 THE COURT: Well, but noon before a 1:15
22 hearing you think it appropriate timing of the
23 filing of a document?

24 MR. HAIL: That was -- frankly, what I
25 had thought actually was that it was actually

1 attached to the Motion to Strike, and I clarified
2 that this morning with Mr. Wacoviak. It was my
3 misunderstanding, and then when I found out it was
4 actually attached to the Reply to the Response,
5 that's when I said we need to definitely get an
6 Objection on file then.

7 THE COURT: Well, I'm not following. So,
8 when was the Affidavit actually filed?

9 MR. HAIL: It would have been filed --
10 let me see here -- March 27th, March 27th in
11 connection with your Reply to Response.

12 THE COURT: Thanks. And so why is it
13 that you would wait 18 days to respond, or to put
14 me on notice? Put aside surprising the other
15 party, but --

16 MR. HAIL: Well, two things. First of
17 all, as I said, it was my misunderstanding that it
18 was attached to another Motion that had been
19 filed. I'm going -- my Blackberry is off but I
20 think it still may pick up. I'm going to take it
21 back over here.

22 THE COURT: Please.

23 MR. HAIL: I found it attached to an
24 Amended Motion to Strike which had been filed
25 right -- matter of fact, maybe the same day or

1 just within a day or so.

2 When I clarified that this morning, then
3 I said, "We need to get it filed."

4 In addition to that, it is really --
5 it's important but very narrow objection, so I
6 mean, all we're essentially doing is objecting to
7 a few legal conclusions or statements made without
8 foundation by Mr. Schmidt in his Affidavit. It's
9 fairly narrow issues.

10 THE COURT: Well, that may be, but help
11 me understand why at noon on the day of the
12 hearing when frankly, I pushed off another hearing
13 that the parties set without my permission today
14 because I was only going to get your response
15 according to Mr. Spector after inquiry Monday.

16 Now, if I didn't have time this week
17 between Monday and 1 o'clock Wednesday to review a
18 Response, why would anybody think it's okay to
19 wait until 1 o'clock or noon with a 1:15 hearing
20 in order to file even a narrow paper?

21 MR. HAIL: I think it would be best --
22 and I understand Your Honor's timing concern,
23 that's a very valid point. I think, as I said, it
24 is fairly narrow issues and only to the extent
25 we'll see what Mr. Roberson argues with regard to

1 Mr. Schmidt's Affidavit, I may just have a couple
2 small rebuttal points along those lines, and he
3 may make some statements that are clearly
4 conclusions or made without foundation with regard
5 to the investigations in Panola County and the
6 Justice Department.

7 I think it's a fairly minor part of this
8 proceeding today, to be honest with you, but you
9 know, I think we'll see --

10 THE COURT: Do you have a copy for me?

11 MR. HAIL: Yes, Your Honor.

12 THE COURT: Well, let's move on and see
13 if they raise any of these issues.

14 MR. ROBERSON: Very well, Your Honor. I
15 have one minor point to bring to the Court's
16 attention with respect to this Objection.

17 If I heard Mr. Hail right, I think he
18 said he thought it was attached to their Response
19 to our Motion to Strike. That Response hasn't yet
20 been filed and it is not due to be filed until
21 tomorrow pursuant to the agreement with
22 Mr. Spector. Originally, it was going to be filed
23 on Monday. Mr. Spector asked us for a short
24 extension apparently because he's ill and we gave
25 it to him, so we haven't seen the Response to the

1 Motion to Strike.

2 MR. HAIL: If I misstated that, what I
3 believe I had stated was I believe it had been
4 filed in connection with the Motion to Strike, the
5 Amended Proof of Claims of pretty much
6 contemporaneously with the Response, so, anyway,
7 just to clarify that.

8 THE COURT: Fair enough.

9 MR. ROBERSON: Your Honor, I don't want
10 to beat a dead horse, but it's our Motion --

11 THE COURT: Then don't. Let's just --

12 MR. ROBERSON: Very well, Your Honor.

13 THE COURT: -- go on.

14 MR. ROBERSON: We're ready to proceed,
15 Your Honor. May I approach?

16 THE COURT: You may.

17 MR. ROBERSON: Judge, what I've handed
18 the Court I've handed counsel copies of the trial
19 aids that we're going to use, we're attempting to
20 use the Court's electronic gizmo system, and
21 hopefully it'll continue to work until the end,
22 but if it doesn't, we have extra copies.

23 THE COURT: The old-fashioned way?

24 MR. ROBERSON: The old-fashioned way. Your
25 Honor, these for your benefit and for the benefit

1 of counsel are excerpts of the various exhibits
2 attached to our Motion for Summary Judgment and a
3 Response, and we've obviously narrowed down to a
4 very small stack of paper what started out as a
5 very large stack.

6 Before I get started, first I want to
7 wish the Court a Happy Anniversary. One year ago
8 today we filed this case.

9 THE COURT: Maybe I should wish you a
10 Happy Anniversary.

11 MR. ROBERSON: Let me summarize our
12 argument, and then I'll go into the body of the
13 argument.

14 First, indemnity was pled in the state
15 court lawsuit, it was not dismissed or nonsuited.

16 THE COURT: But only indemnity as to
17 attorneys' fees?

18 MR. ROBERSON: No, Your Honor, we plead
19 indemnity broad, as I'll show you here in a
20 moment.

21 THE COURT: Okay.

22 MR. ROBERSON: We believe that it was
23 pled, it was pled broadly. It is subject to the
24 Mother Hubbard clause of the Final Judgment. As
25 the Court knows, the Mother Hubbard clause says,

1 "Anything not expressly granted is denied."

2 Indemnity was pled; it was not expressly
3 granted, and therefore, I think it was denied.

4 Secondly, indemnity was pled in the State
5 Court. It was neither nonsuited or dismissed, but
6 it was not presented to the Jury. Under the Texas
7 Rules of Civil Procedure, if you have a live
8 pleading or present evidence and fail to present
9 it to the Jury, that cause of action is waived.

10 THE COURT: What Rule is that?

11 MR. ROBERSON: It's Rule 279, Your Honor.

12 Thirdly, if indemnity was not pled, we
13 believe there's more than sufficient evidence that
14 it was, it is barred from later assertion because
15 it was a compulsory counter-claim and is barred by
16 res judicata if not pled by the party later
17 asserting indemnity, and I'll demonstrate that
18 here in a moment.

19 Lastly and most importantly, this
20 indemnity provision clearly is limited to claims
21 by third parties against the indemnitee, not by
22 claims by and between the indemnitee and the
23 indemnitor which is what we have here.

24 Moreover, this indemnity provision has
25 certain limitation to it, as most indemnity

1 provisions do. It's limited to claims arising from
2 the engagement under the Letter Agreement which
3 was an engagement to provide investment banking
4 services, or pursuant to the engagement. And the
5 claims cannot be the subject of bad faith or
6 willful misconduct.

7 As I'll show you here in a moment, the
8 Jury found that there was unclean hands and
9 willful misconduct of two of these parties, and we
10 believe that willful misconduct and unclean hands
11 are bad faith and a misappropriation of trade
12 secrets which is what the Jury found as a willful
13 act.

14 Therefore, we think a combination of
15 Rooker-Feldman, res judicata, Texas law bar all of
16 the claims asserted in the original Proof of Claim
17 and in the Amended Proof of Claim, save and except
18 a very small portion of attorneys' fees which
19 we'll talk about here in a second.

20 Let me give the Court a bit of
21 background. If you recall, pursuant to an Order
22 this Court issued in I believe early December of
23 2008, Dorado Exploration superceded the trial
24 court judgment by putting up approximately \$1.3
25 million in cash and delivering to Impact 5 percent

1 of the common shares of Impact.

2 You'll recall on February 17th, I'm not
3 sure where the Court was because we did it by
4 telephone, the Court requested a status conference
5 to try to determine how much time we needed to go
6 to trial.

7 At that point in time there was a
8 discussion about what we were going to try because
9 what we were going to try would determine how much
10 time we needed to try it.

11 The Court asked me to forward to it, to
12 you, a copy of an Attachment to the original Proof
13 of Claim.

14 Your Honor, Slide 1 which is before the
15 Court both on Screen and on the first page of the
16 stack I handed you is the Attachment to the
17 original Proof of Claim.

18 We discussed that during the status
19 conference, and you asked the question: "What are
20 we going to try?"

21 And after discussion, what you were told
22 was: "We are going to try A-5 which the first
23 highlighted section of this Attachment and B-5."

24 Before we concluded that day, Mr. Spector
25 advised you that the Impact Group intended to add

1 as indemnity claims the Judgment that Dorado took
2 against Impact which is approximately \$400,000.

3 You instructed -- we advised the Court
4 we thought it was late. Obviously, that's a
5 subject of a Motion to Strike we'll hear later,
6 and you instructed Mr. Spector to get that on file
7 by I believe by the following Friday which he did.

8 Also, a part of the original Proof of
9 Claim was a schedule that breaks down the various
10 legal fees which are in -- were A-5 in the
11 original Proof of Claim into various categories.
12 The Court can see at the top before the hatch line
13 in the middle of the page these are the total
14 costs incurred by Impact, \$734,000, and then below
15 that you can see there's a break-down of a portion
16 of those fees that relate to Panola County.

17 Below that in part of the two highlighted
18 sections you see the total cost WBH, that's
19 Mr. Heyn, one of the Impact Claimants, and then
20 below that you see the total cost of JVC, that's
21 Jack Calce.

22 This was part of the original Proof of
23 Claim, and it gives us guidance as to what was
24 incurred and when it was incurred, and we'll come
25 back to that here in a moment.

1 THE COURT: All right.

2 MR. ROBERSON: On March the 4th about
3 three weeks after that status conference, we had a
4 hearing on a Motion to Compel. The Court will
5 recall, there were issues with certain legal
6 invoices that had been presented. We took the
7 position that they were improperly redacted. We
8 came to the Court, the hearing essentially turned
9 into a status conference. The Court suggested
10 that we needed to try to narrow the issues and
11 ordered us to proceed through a Summary Judgment
12 process which obviously we're here on today.

13 Just prior -- three or four days prior
14 to that hearing, the Impact entities had amended
15 their Proof of Claim. Slide 3, please.

16 Slide 3, Your Honor, there's actually
17 four pages of it. We took the original Attachment
18 to the original Proof of Claim and blew it up into
19 a chart and landscape format, but essentially each
20 of the elements in this Chart correspond to
21 elements in the original Chart with 7 exceptions
22 which I'll get to here in a minute.

23 As the Court can see, Item 1, Item 2,
24 Item 3, Item 4 all reference, use the term
25 "Pursuant to the Final Judgment." They're

1 referring to the Final Judgment in State Court.

2 Go to the next page, please.

3 Item 6 through 12 are the new items that
4 were added just prior to the hearing on the Motion
5 to Compel, and these 7 categories are the various
6 elements of Dorado's Proof of Claim -- excuse
7 me, Dorado's Judgment against Impact.

8 Again, as you can see, referenced in
9 virtually every category to "Pursuant to the Final
10 Judgment."

11 Next page, please.

12 Items 10, 11, 12 at the top deal with the
13 indemnity claim. And then Items 13 to the end of
14 this exhibit are all part of the original, have
15 just been renumbered.

16 Let's go to the last page, please.

17 And, Your Honor, you can see all the way
18 to Item Number 21, problems on the right were
19 Mr. Spector's efforts to assist us I think and the
20 Court identifying who had each of these claims,
21 whether it was Mr. Heyn, Mr. ** Calce or Impact
22 itself.

23 Your Honor, when we got to that hearing
24 on March the 4th, we were attempting to try to
25 figure out --

1 THE COURT: Let me just ask a question.
2 20 and 21 are also new, they were not in the
3 original Plan?

4 MR. ROBERSON: 20 and 21 were separately
5 claimed by Mr. Heyn and Mr. Calce in their own
6 Proofs of Claim.

7 THE COURT: In their own Proofs of Claim?

8 MR. ROBERSON: Yes. And, Your Honor, if
9 we can go back one entire slide, I think I'll show
10 you where those numbers come from. One more page.

11 THE COURT: Yeah, I think it's the
12 attorneys' fees there.

13 MR. ROBERSON: Yes. And both Mr. Heyn
14 and Mr. Calce filed their own Proofs of Claim with
15 this very same Attachment.

16 THE COURT: All right.

17 MR. ROBERSON: Your Honor, at the hearing
18 the Court inquired where we were, told the Court I
19 thought we had an Agreement to try to take these
20 attorneys' fees is what I thought we were down to
21 and put them in the pockets.

22 What I heard at that hearing was that
23 Impact orally asserted that they were entitled to
24 indemnity for all 21 subparts of the Amended Proof
25 of Claim which I just went through.

1 The Court suggested that we needed to go
2 through the Summary Judgment process which we now
3 have done.

4 So, prior to that hearing, leading up to
5 that hearing, I thought we were talking about
6 attorneys' fees, and these new counts at that
7 hearing we learned that they were seeking
8 indemnity on all 21 counts.

9 Since that time --

10 THE COURT: But really, the difference
11 is, seeking indemnity on the Judgment that they
12 got against you is irrelevant. At least as I
13 understand, they're not really seeking indemnity
14 on that, they're seeking indemnity from you with
15 respect to the Judgment you got against them, or
16 Dorado got against them.

17 MR. ROBERSON: Your Honor, I thought that
18 until we got to that hearing, but what I heard at
19 that hearing was, "We are seeking indemnity for
20 everything, Judgment Dorado got against them, the
21 Judgment they got against Dorado, all the legal
22 fees associated with --

23 THE court: But it makes no sense to
24 indemnify for a Judgment that you got against you.

25 MR. ROBERSON: I agree with you, Your

1 Honor.

2 THE court: I mean, they don't need that,
3 they've already got a Judgment against you. An
4 Indemnity Judgment is only a second Judgment for
5 the same amount of money. I guess I'll leave that
6 for them, but that's at least not what I
7 understood. I thought that they were seeking
8 essentially the new indemnity argument, if you
9 will, was that Dorado was obligated to indemnify
10 them for the Judgment obtained against them.

11 MR. ROBERSON: Your Honor, and that was
12 my understanding as I walked to the podium at that
13 hearing. As I walked away from the podium
14 following that hearing --

15 THE COURT: You heard something
16 different?

17 MR. ROBERSON: I heard something totally
18 different which was, "We're seeking indemnity for
19 everything." So, we have briefed it that way, and
20 I would agree with the Court, part of that's
21 nonsensical, but we did brief it.

22 Now, since that time, and maybe it's a
23 retrenchment of position or change of position,
24 I'm not sure, or maybe it's just a mistake, but
25 the Impact claimants in their Response to our

1 Motion for Summary Judgment and in their Motion
2 for Summary Judgment say on Page 21, "Claimants
3 seek only indemnification for fees and expenses
4 incurred in connection with proceedings which
5 occurred in State Court and pursuant to the
6 specific Indemnification Agreement articulated
7 herein."

8 And what they're talking -- the
9 articulated Indemnity Agreement is obviously the
10 one we're talking about here, so --

11 THE COURT: What page -- you said Page
12 21, but of what document?

13 MR. ROBERSON: Impact's Response to our
14 Motion and their Cross-Motion.

15 THE COURT: Okay.

16 MR. ROBERSON: So, again, it could be a
17 change of position, it could be going back to the
18 position that we heard -- or that we saw in the
19 original Proof of Claim, it could be a mistake,
20 but we were -- the original Proof of Claim was
21 indemnification for attorneys' fees, we had a
22 status conference, we added -- the counts
23 related to the Judgment. We had a hearing on the
24 4th, the Motion to Compel. It went to -- in my
25 mind, it went to 21, and I'm not sure whether

1 we're now back to just attorneys' fees.

2 THE COURT: Well, let's clarify that
3 right now --

4 MR. ROBERSON: Very well.

5 THE COURT: -- because no point in
6 spending a lot of time on things they aren't
7 seeking.

8 So, Mr. Hail, what is it that you're
9 seeking?

10 MR. HAIL: I was going to poll with
11 reference to see what we referred to. Sound like
12 it may have been a mistake, I don't know what the
13 context of that was. We're seeking indemnity for
14 all the amounts we set forth in our Amended Proof
15 of Claim recognizing that certain of those
16 amounts, the positive Judgment of Impact back
17 against Dorado is now to appeal. You know, we
18 certainly asserted --

19 THE COURT: Well, it's all subject to
20 appeal.

21 MR. HAIL: Well, we have a recovery
22 subject to appeal. We've set -- otherwise,
23 we're seeking recovery for just in broad
24 categorical categories: We've got the --

25 THE COURT: Well, no, just how do you

1 seek indemnity for a Judgment that you obtained?

2 MR. HAIL: It --

3 THE COURT: That's not a claim against
4 you. That was your claim against them.

5 MR. HAIL: No, it's not a claim against
6 you, but it's, you know, damages or losses
7 incurred in connection with our representation of
8 Dorado to the extent that something that is the
9 subject of indemnity which I think it could be
10 broadly wide enough to do that.

11 THE COURT: But you have a Judgment. Why
12 --

13 MR. HAIL: We do have --

14 THE COURT: What difference does that
15 make as an indemnity claim versus a Judgment?

16 MR. HAIL: Well, let me say this. It may
17 not make any difference, I think just being a
18 prudent practitioner, we certainly want, you know,
19 on a timely basis to assert indemnity for all the
20 claims that we would have the right to.

21 We're not seeking to -- as we said
22 before, for purposes of a trial or even for
23 purposes for any Summary Judgment, we're not
24 questioning that amount, should have been 776 or
25 976 or 576, those type of issues are being dealt

1 with by the parties on appeal, just talking about
2 the actual amount of damages, and of course, there
3 was stock amount. Both sides are saying, "Well,
4 it should have been zero," and we're saying it
5 should have been higher. Those are not the things
6 that we'll be dealing with here in this Court --

7 THE COURT: No, I understand that.

8 MR. HAIL: -- either today or at the
9 trial.

10 THE COURT: So, you're really seeking
11 indemnity for a Judgment that you've already
12 obtained against them, so you want Dorado to
13 indemnify you from a Judgment you've already
14 obtained against Dorado?

15 MR. HAIL: Well, we haven't recovered on
16 that, but we've incurred those losses.

17 THE COURT: But you'll either collect on
18 the Judgment -- the indemnity's meaningless.
19 You'll either collect on the Judgment or you
20 won't. And if you can't collect on the Judgment,
21 then the Indemnity is not worth the paper it's
22 printed on.

23 MR. HAIL: Well, but to the extent there
24 is money is in this Court upon which to collect
25 against which there may or may not be money --

1 THE COURT: There isn't money in this
2 Court at this point that I'm aware of.

3 MR. HAIL: I thought there was some money
4 --

5 THE COURT: Well, there's the
6 supersedeas, but you got that for the Judgment,
7 and that's in the State Court, I thought.

8 MR. HAIL: Yeah, the supersedeas does
9 directly relate to the State Court.

10 THE COURT: Okay. So, what money do you
11 think is here?

12 MR. HAIL: Maybe Mr. Spector can
13 elaborate on this, if Your Honor would indulge me.

14 THE COURT: Of course.

15 MR. SPECTOR: It's the reserve on the
16 claims that they've reserved.

17 THE COURT: But they didn't reserve for
18 the Judgment you got against them.

19 MR. SPECTOR: That's correct. They
20 reserved \$800,000 for our Proofs of Claim, and
21 what I think Mr. Hail is saying, if you wouldn't
22 mind me confirming this with him?

23 (COUNSEL CONFER)

24 MR. SPECTOR: The way I would explain
25 this is, Impact clients are asserting indemnity

1 claims for the same claims that were asserted in
2 the State Court. It's simply a new cause of
3 action that we assert is not covered by the trial.

4 It's not that we're looking for indemnity
5 for the Judgment that they have against us, as
6 Your Honor pointed out, that doesn't make any
7 sense, but we are asserting an indemnity claim for
8 all the damages we have suffered, many of --

9 THE COURT: But why? The Judgment's been
10 superceded. I mean, this makes no sense to me at
11 all, and everybody, listen.

12 MR. SPECTOR: Because at least in theory.

13 THE COURT: The Judgment's been
14 superceded. So, if you prevail on appeal, you're
15 going to get paid.

16 MR. SPECTOR: Correct.

17 THE COURT: You don't need the indemnity
18 claim.

19 MR. SPECTOR: But if we don't prevail on
20 appeal, I think Mr. Hail, and he correct --

21 THE COURT: You think that I'm going to
22 give you money that the State Court on appeal
23 takes away from you?

24 MR. SPECTOR: You might under an
25 indemnity theory if we lost in the State Court

1 under those claims. I think that's what Mr. --

2 THE COURT: Oh, you gotta be kidding me.
3 You think that I'm going to relitigate those
4 issues that have been litigated once, the
5 liability has been litigated once, and I thought
6 that's the whole point of lifting the Stay. Quite
7 frankly, if you all want me to decide whether
8 somebody goofed something up, come on back here.

9 MR. SPECTOR: Your Honor, I think --

10 THE COURT: Why should I retry issues
11 that have been tried in State Court?

12 MR. SPECTOR: Well, because I think Mr.
13 -- I think again, I'll let Mr. Hail speak for us,
14 but I think the answer is, if they're not barred
15 by a collateral estoppel theory or res judicata
16 theory, then we're permitted to make those claims
17 in the bankruptcy court.

18 THE COURT: I'm struggling with that, but
19 at least we both have our answer. It's
20 everything, Mr. Roberson. You didn't mishear. I
21 did, believe it or not.

22 MR. ROBERSON: Your Honor, Mr. Hail and
23 Mr. Spector remind me of something that quite
24 frankly, I guess further discombobulates me, I
25 attended the DEI Confirmation hearing, and at that

1 hearing Mr. Spector argued the objections to that
2 Confirmation and Plan based on impairment.

3 And the Court said, "What are your
4 claims, Mr. Spector?"

5 Mr. Spector said, and I'm paraphrasing, I
6 don't have the transcript in front of me, "Your
7 Honor, we have the right to indemnity for legal
8 fees of approximately \$800,000." And you ordered
9 the estate to set aside \$800,000 if, as and when
10 that issue was tried.

11 We now know, I now know that at least 275
12 of that was an absolute duplicate, and I think
13 almost all of it was a duplicate if it's already
14 been tried in State Court, but nonetheless, there
15 was 800,000 escrowed.

16 But as far back as November the 24th, my
17 brain, and I assume the Court's brain was saying,
18 we're limiting -- this is limited to attorneys'
19 fees.

20 We go to a Status Conference, attorney's
21 fees, and maybe this other Judgment.

22 Then we go to all 21, so I'll argue all
23 21.

24 Again, Your Honor, I would point out what
25 may be a judicial admission by them, their own

1 pleading in Response to our Summary Judgment says
2 they seek only fees and expenses.

3 Your Honor, the core issue we have here
4 today, in my mind, we have no disagreement.

5 May I have Slide Number 5, please.

6 The Court will recall that the Stay was
7 lifted to allow the State Court Appeals to
8 continue.

9 What I have before the Court on the
10 Screen, hopefully the Court can read it, is
11 Mr. Spector's pleading in which he says, "Because
12 of the Rooker-Feldman Doctrine operation to deny
13 subject matter jurisdiction to this Court to
14 review issues subsumed within the Final Judgment."

15 I could not agree with him more, and I
16 think the Court essentially said that a moment
17 ago.

18 By his admission, if a claim is subsumed
19 in a Final Judgment, it's subject to Rooker-
20 Feldman and this Court cannot relitigate.

21 So, the issues is: What was subsumed in
22 the Final Judgment.

23 Let's first look at what was pled at
24 trial.

25 May I have Slide Number 6, please.

1 Now, under Slide Number 6, there's
2 actually three pages. The first page is Page 4 of
3 the Third Amended Counterclaim which was live at
4 the time of the Judgment, and it is a count for
5 Declaratory Judgment asking the Court to indemnify
6 the Defendants for all their attorneys' fees and
7 costs in the lawsuit pursuant to Annex paid to
8 Annex A --

9 THE COURT: Who's the indemnification.

10 MR. ROBERSON: -- is the indemnification,
11 Page 4 of the Agreement.

12 And the Court obviously recalled that
13 from before we got in here today.

14 Let's go to the next page.

15 The next page is a Breach of Contract
16 count in the Third Amended Counterclaim, and you
17 can see there, the Plaintiffs -- excuse me --
18 Impact says that the Plaintiff Dorado,
19 "Unequivacally refuses to make any payment due
20 under the terms of the Agreement, or indemnify
21 Defendants in any way."

22 Further down on the page, it says:

23 "Dorado's refusal to pay the Defendants costs and
24 expenses or offer indemnity of any kind."

25 I read that to be a count for breach of

1 an indemnity provision, a breach of contract for
2 failure to indemnify.

3 Next page, please.

4 And the sixth page of that same, Third
5 Amended Counterclaim is a count for attorneys'
6 fees, Paragraph 20. "We seek all attorneys' fees
7 and costs incurred in this case."

8 THE COURT: But, of course, pursuant to
9 38001.

10 MR. ROBERSON: Pursuant to 38001, or --
11 pursuant to 38001.

12 THE COURT: In this Section. Obviously,
13 --

14 MR. ROBERSON: In this Section.

15 THE court: -- in the indemnity, they've
16 asked for a declaration that they're entitled to
17 be indemnified for that.

18 MR. ROBERSON: Correct. They further, as
19 you can see in Paragraphs 19 and 21 seek
20 attorneys' fees under other theories, including
21 --

22 THE COURT: Of course, yes.

23 MR. ROBERSON: -- 3709.

24 THE COURT: Yes.

25 MR. ROBERSON: There's no doubt that this

1 indemnity claim was live in ** Mesh's Affidavit
2 which is before the Court, indicates he's reviewed
3 the pleadings on file and this Third Amended
4 Counterclaim was neither nonsuited or dismissed.

5 Did Impact seek a recovery on its
6 indemnity claims?

7 May I have the next slide, please.

8 Your Honor, this is an excerpt from the
9 second Motion for Summary Judgment filed by
10 Impact, and I believe Blue Lion in the State Court
11 lawsuit where they're seeking via a Summary
12 Judgment a declaration -- or a Summary Judgment
13 for their Declaratory Judgment Count for
14 attorneys' fees.

15 Next page, please.

16 The same Summary Judgment, they are
17 seeking a Summary Judgment for indemnity pursuant
18 to Annex A of the Letter Agreement, again, it's
19 their breach of contract count, and they are
20 clearly seeking affirmative relief.

21 If a cause of action is pled, how does a
22 party remove it from a lawsuit? How do you get it
23 out of and away from the effect of a Mother
24 Hubbard clause?

25 Next slide, please.

1 Rule 162 tells us that "Anytime before
2 the Plaintiff has introduced all of his evidence
3 of the rebuttal evidence, the Plaintiff may
4 dismiss the case or take a nonsuit which shall be
5 entered in the Minutes."

6 Then Mesches' Affidavit indicates that
7 the Third Amended Counterclaim was neither
8 amended, withdrawn, removed or nonsuited, and that
9 there's no entry in the State Court Minutes of
10 such an action by the State Court Judge.

11 It's undisputed that the indemnity counts
12 in the Third Amended Counterclaim are not
13 dismissed or nonsuited, they were live at the time
14 of trial, and if there's a Mother Hubbard clause
15 in the Final Judgment, then I believe they were
16 disallowed by the Court.

17 Let's take a look at the Final Judgment.

18 Slide 9, please.

19 Your Honor, this is the last page of the
20 Final Judgment entered by Judge Greg Smith,
21 February 4th, 2008, last paragraph: "All relief
22 not expressly granted herein is denied. This
23 Judgment finally disposes of all claims and all
24 parties and is appealable Final Judgment."

25 That's as classic a Mother Hubbard clause

1 as I've seen.

2 I believe the effect of that clause is to
3 disallow anything that was pled, and what was pled
4 was indemnity.

5 Now, in their Response, they take the
6 position that because indemnity was not presented
7 to the Jury, that it was somehow taken out of the
8 lawsuit. The entire Jury Charge is Exhibit 9 to
9 their Response, and I did not repeat the entire
10 Charge because I didn't think it was necessary to
11 do so.

12 The entire Charge -- a review of the
13 entire Charge will reveal what they admit which is
14 that indemnity was not presented to the Jury.

15 Two questions, though, that I do want to
16 focus on. Question Number 4, question put to the
17 Jury and answered by the Jury: "Did any of the
18 following misappropriate Dorado's trade secrets,
19 if any?" Part of the trade secret question
20 involves a definition of "the confidential
21 relationship which is a relationship based on fair
22 dealing and good faith." The Jury found that all
23 4 of the Impact claimants did misappropriate trade
24 secrets, and thus, in my view, breached a
25 confidential relationship and acted in bad faith.

1 The next question I want to focus on is
2 Question 15 of the Charge.

3 Question 15 asks: "If Impact and/or Blue
4 Lion acted with unclean hands." The Court's
5 Charge to the Jury with a definition of unclean
6 hands as "Conduct which is inequitable, unfair,
7 dishonest or fraudulent and deceitful with regard
8 to the controversy in issue."

9 The Jury found "yes" that they had acted
10 with unclean hands.

11 THE COURT: But that was in context of
12 the ** Quantomaro claim, as I understand it which
13 is not a claim upon which they elected recovery.

14 MR. ROBERSON: It is a claim that they
15 chose not to recover, but they reserved it as an
16 alternative theory of recovery, and if we're
17 talking about all 21 counts, it's in the list of
18 21 that we're here on today.

19 Your Honor, if you have a pleading that
20 pleads a count, and you do not put on evidence on
21 that count and you do not present it to the Jury,
22 under State law you have waived that cause of
23 action.

24 Let me show you Texas Rules of Civil
25 Procedure 279. 279 says "On appeal, all

1 independent grounds of recovery" in this case, the
2 pled indemnity claims, "not conclusively
3 established under the evidence and the element
4 (sic) of which is submitted or requested are
5 waived." So, it's either got to be submitted to
6 the Jury or there's got to be evidence at the
7 charge conference it was requested.

8 There's no evidence that it was either
9 submitted or requested. I think under Rule 279,
10 the failure to submit the pleaded counts of
11 indemnity result in the waiver of indemnity.

12 THE COURT: Okay. So, by requested, you
13 mean that they asked the Judge to submit it to the
14 Jury, and the Judge declined --

15 MR. ROBERSON: Correct. That's how I
16 interpret it

17 THE COURT: -- which would then be an
18 issue presumably taken up on appeal as well,
19 though?

20 MR. ROBERSON: That's how I would
21 interpret it.

22 Your Honor, they admit, in fact, they
23 argue in their Response that because it was not
24 submitted to the Jury, that indemnity was not
25 before the Court in the State Court action. I

1 think failure to take it out of the lawsuit by
2 nonsuiting it, and then the combined -- or
3 compounding problem of leaving it in and not
4 presenting it to the Jury is essentially a double
5 whammy. 162 and 279 I think say, You got to get
6 it out or you're at risk of Mother Hubbard, and if
7 you leave it in and don't charge the Jury with it,
8 you waive it.

9 So, I think under Texas law, the Impact
10 claimants cannot now argue they are entitled to
11 relief under an indemnity theory. By not
12 presenting the indemnity relief to the Jury, the
13 Impact claimants waived any right to now seek
14 recovery for indemnity.

15 Now, let's talk about what I'll call the
16 "Third Problem with this Discussion."

17 There is law in Texas that says that an
18 indemnity claim arises when the Judgment is
19 entered against the Indemnatee. Now, it's an
20 accrual theory. And there's case law that says
21 that.

22 THE COURT: Well, for lack of a better
23 word, that's the general rule.

24 MR. ROBERSON: I think that's the general
25 rule. And that's I think the general rule in

1 Texas, and the case most often cited "Ingersol-
2 Rand".

3 There are, however, exceptions to that
4 rule.

5 THE COURT: Getty Oil.

6 MR. ROBERSON: Getty Oil is a very good
7 exception, and I'm glad the Court raised that
8 because Eddy Oil instructs us what you have to do.

9 Getty Oil says if you file any kind of
10 affirmative relief -- in Ingersol-Rand there was
11 no affirmative relief. Getty says if you file for
12 affirmative relief of any kind, as long as it's
13 related to the same subject matter, you become a
14 plan (sic) for purposes of res judicata, and you
15 must bring all of your causes of action.

16 Now, I say to myself: How do you square
17 that? How does somebody have a accruing cause of
18 action and be obligated to bring? Well, Getty
19 answers that.

20 THE COURT: Because it was permissive,
21 according to Getty.

22 MR. ROBERSON: It's permissive, and you
23 can reserve in your cause of action for the
24 ultimate determination by the Court.

25 I believe that law in Getty, as also

1 discussed in the Texas Transportation case and the
2 Team Promotions case which we cite, instruct us
3 what should have happened here.

4 Once the Impact Group pled breach of
5 contract, declaratory judgment, sought their
6 attorneys' fees which were clearly affirmative
7 relief, they had to bring the indemnity cause of
8 action, and if they didn't -- and I believe they
9 did, I think it's clear they did -- but if they
10 didn't, then I believe they're subject to res
11 judicata and cannot now bring it. I think they're
12 stuck.

13 THE COURT: Do you think that -- I heard
14 you say it more broadly than I expected you to, so
15 let me just pick at it a minute.

16 Had they just counter claimed for
17 attorney fees, had they just counter claimed for
18 breach of contract and demanded their attorneys'
19 fees under 38001, not raised indemnity at all,
20 would Ingersol-Rand or Getty govern?

21 MR. ROBERSON: Getty.

22 THE COURT: So, any claim, irrespective
23 of whether it's the indemnity claim?

24 MR. ROBERSON: It's any claim that arises
25 out of the same subject matter. The breach of

1 contract claim here clearly arises out of the
2 Letter Agreement, and the indemnity claim that
3 we're talking about now is part of that same
4 Letter Agreement. It's the fourth page of that
5 Letter Agreement.

6 THE COURT: Well, I'm perplexed about
7 something, and that is, where is the
8 confidentiality agreement that Dorado obtained a
9 Judgment against Impact with respect to? Because
10 I -- is it a separate agreement from the
11 engagement agreement that has the indemnification
12 annexed?

13 MR. ROBERSON: Your Honor, I don't know
14 that we have any evidence before the Court on
15 either side. My understanding is that yes, there
16 is a Confidentiality Agreement I believe it's
17 contemplated by the Letter Agreement, but my
18 understanding is they're two separate agreements.

19 THE COURT: Because I looked in the
20 appendices and never found a Confidentiality
21 Agreement and I never found a Confidentiality
22 Provision in the Engagement Agreement, so wasn't
23 -- and that's neither here nor there.

24 But, so, you sued for breach of
25 Confidentiality Agreement, as I understand the

1 historical predicate.

2 MR. ROBERSON: I think misappropriation
3 of trade secrets, and I believe there was a breach
4 of confidentiality, but I think what the Jury
5 found was that there was a misappropriation of the
6 trade secret.

7 THE COURT: All right, and you're right,
8 that was loose language on my part. But the trade
9 secret was the confidential information?

10 MR. ROBERSON: Correct.

11 THE COURT: So, you sued for
12 misappropriation of a trade secret. Did Impact
13 -- was Impact obligated to sue -- to
14 counterclaim for breach of contract?

15 MR. ROBERSON: If they are two separate
16 agreements, I would say it would be a permissive
17 counterclaim, not compulsory, but once you bring
18 that counterclaim clearly related to this -- I
19 mean, clearly arising out of the same facts, all
20 part of this relationship and the transactions
21 between these parties, I think Getty tells us that
22 once you seek affirmative relief, then you become
23 the Plaintiff, and res judicata, the doctrine of
24 res judicata tells us if you ask for part of your
25 relief, you have to ask for it all even if it's